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United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

STENTOR ELECTRIC MANUFACTURING COMPANY, INC.,
Plaintiff-Appellee,

vs.

KLAXON COMPANY,
Defendant-Appellant.

No. 7398.

PETITION FOR REHEARING.

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HENRY M. HOGAN,
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The Court Pr[illegible] 150 Bay St., Jersey City, N. J.

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vs.

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No. 7398.

PETITION FOR REHEARING.

Defendant-appellant respectfully prays for a rehearing of the above entitled appeal upon the following grounds:

I.

The Court's opinion overlooks the force and effect of the action of the court below in denying appellant the right to prove the patents were invalid.

The opinion of Judge Goodrich correctly states:

> "He contends that the articles covered by the patents had no commercial utility, that the District Court erred in holding that the contract was a license rather than an assignment and instructing the jury that the defendant could not question the validity of the patents. These points involve, in our judgment, the same general proposition and will be treated together, for both go to the proposition whether the defendant was in default in failing to use its best efforts in the manufacture and sale of the articles covered by the agreement" (pp. 5-6).

This Court, however, completely overlooked the action of the Court below in ruling for all purposes of the case that the defendant could not prove that the patents were invalid. To this ruling defendant excepted. Thereafter it abided by this ruling and stood on the rights which its exception gave it (see Reply Brief, p. 16).

Would this Court have decided this case as it did, had the evidence proved that the patents were in fact invalid?

Would the Court and jury expect a defendant to use the same efforts to manufacture and sell under invalid patents that it would have used had the devices been protected by valid patents?

Invalidity of the patents was a material issue for the consideration of the jury, separate and apart from its bearing as a condition precedent to showing failure of consideration.

The trial Court having barred defendant's proof of invalidity charged the jury that defendant could not question the validity of the patents.

This Court said, "It is sufficient to say that the fact problems here were for the consideration of the jury and there was ample evidence to support its finding."

This conclusion of this Court shows the harm suffered by defendant by the exclusion below of proof that the patents were in fact invalid.

Had defendant been allowed to prove invalidity the jury might have found for defendant.

II.

The hearsay and speculative character of certain testimony given by Hollister over objection has been overlooked by the Court.

This Court held that Hollister's testimony was admissible because "the question was opened" (Opinion, p. 10).

The only question raised by defendant in its examination of Hollister was how much more profits should Klaxon have made, or, in other words, what were Stentor's damages (A. A. 19-22)? That question was really opened by the service of the summons and complaint.

The rule of law to which this Court points is that "one who induces a trial court to let down the bars *to a field of inquiry* that is not competent or relevant to the issues, cannot complain if his adversary is also allowed to avail himself of the opening." *Warren Livestock* v. *Farr*, 142 Fed. 117.

On direct examination plaintiff's counsel asked Hollister:

> "Q. Shouldn't Klaxon have made more profit? A. Yes" (A. A., 20).

On cross examination defendant's counsel asked:

> "Q. How much more should it have made?" (A. A., 20). "A. I personally cannot measure because it seems to me so large. That is the difficulty" (A. A., 22).

This question is the only reason the Court has given for allowing testimony which was pure hearsay and testimony which this Court has described as "pretty highly speculative" (Opinion, p. 10).

A question on cross examination as to the amount of a plaintiff's damages has never opened the door to hearsay testimony and to "highly speculative testimony".

The cases cited by the Court in support of its decision do no more than relax the rules of relevancy; they adhere to all the rules of competency. Adherence to the rule of competency would result in barring all hearsay and speculative testimony of Hollister.

Hollister admitted that his testimony included figures given him the night before by Mr. Langley (A. A., 112).

Hollister should no more be allowed to tell the jury Langley's calculations of damages than to tell what Langley told him as to what Klaxon's best efforts should have

been, and surely that would be hearsay of the most obvious character, however open the question of best efforts might have been.

Moreover, the census figures of all loud speakers of every type sold in the country for three years were not made competent by any apparent relevancy to the question of damages (P. Ex. 50).

The census figures for three years, 1923, 1925, 1927, showed the total sales of all types of receivers in a given year.

They did not show how many receivers of each type were sold, or the number sold by each individual manufacturer. For the three unreported years, 1922, 1924, and 1926, there were no census figures. Hollister was permitted to estimate the total sales for such years from the totals for the three reported years.

While such figures would approximate the total sales in the country one can only speculate as to what Klaxon's share of such sales would or could have been. Hollister speculated that Klaxon's share would have been 10%.

Defendant submits such speculations are fanciful in the extreme.

It is like permitting a witness to assume from the mere fact that 5,000,000 automobiles were sold in the nation in 1939, that Stutz would have sold 10% or 500,000, had it not gone into receivership several years before.

The Spence device could only be used in head phones and the horn-type speaker. The census figures included cone and dynamic speakers, which in 1923 superseded the head phones and horn-type speakers. Hollister was permitted by the Court below to guess that Klaxon should have sold 10% of the total. He could not even have guessed how many of the total sales actually made represented cone-type receivers.

When objection was made to this evidence Judge Nields said:

"I recognize the force of the objection. For what it

is worth it is admitted subject to the final ruling of the Court," etc. (A. 96).

Again he referred to it as "all this census stuff" (A. brief, 32). It was just that!

We know of no other case where a Circuit Court of Appeals has allowed a judgment for breach of contract to stand where proof of damages was in the Court's own language "pretty highly speculative".

III.

The Court was led into error in holding that the profits to which the Court referred for 1917 and 1918, support the verdict.

It is uncontradicted that according to the plaintiff's contentions the profits in 1917 and 1918 were made on the war-boom marine field. Profits in the autophone field were the only ones that were made by the defendant in the succeeding fourteen years and were determined by accountants to be approximately $70,000. Plaintiff was paid its share of these profits and they are not involved in this action. The possibility of any profit from "other private business available" never passed the stage of contemplation referred to in the rule set forth in the case cited by the Court, *Hedrick* v. *Perry*, 102 Fed. (2nd) 802, at 806:

> "Anticipated profits from a business which is contemplated but not established are too remote and speculative to form the basis upon which to recover damages for the reason that there are no facts from which the amount of such profits can be determined with the degree of certainty required by law." (Citing cases.)

The "going business" in the marine field was terminated as effectively by the close of the World War as the prohibition amendment terminated the liquor business.

In every case applying the "going business" rule the potential business was identical with the previously transacted business. Profits from the potential business here clearly fall within the "contemplated or new business" rule, for there are no facts from which one can say that such potential business would result in any profit, much less the amount of said profit.

IV.

The Court has excused plaintiff's failure to prove damages resulting from alleged double pricing because of its belief that "a wrong had been committed".

However reprehensible the letter of July 27, 1926, may sound, the fact remains that the letter is only a suggestion by an underling, which suggestion was not proven to have been carried out in fact.

A fair reading of the report for the preceding quarter dated September 18, 1929 (Ex. P. 70), which stated in part: "We have lost all of the business with the Fisher Body Company", would preclude any corroboration of such double pricing by inference from the report dated December 19, 1929 (Ex. P. 40).

It is clear that the profit referred to in the report dated December 19, 1929, was a profit to Klaxon Company, since Plaintiff's Exhibit 44 shows that no profit to Stentor was earned during that period.

But even if plaintiff's evidence "was clear on the fact that a wrong had been committed", plaintiff's burden of proof would include the burden of proving damages by available evidence. The Court noted the fatal omission in that proof of damages, but stated that "if the facts were otherwise they were peculiarly within the knowledge of the defendant". This observation overlooks not only that plaintiff had the burden of proof but also the fact that defendant could only expect to show that prices to

various manufacturers differed and to state that such differences were determined in good faith in view of market conditions at the time and quantity purchased. The observation further overlooks the fact that defendant could not controvert an estimate of damages resulting from an alleged wrong which in fact was not committed. Moreover, the burden of proof being on plaintiff, and there being no lawful evidence to support a verdict on double pricing, defendant was under no obligation to take the time of the Court to produce evidence to overcome what had not been proved against it.

The quotation from *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562-3 (1931), excuses the failure to prove the exact amount of damages where such proof is precluded by the nature of the wrong, but does not excuse the failure to prove the necessary links in the chain of damages when such links are available. Proof of the amount of the price differential if any in favor of affiliates, and of any sales to affiliates during the years 1928, 1929 and 1930, and the amount of any such sales could have been secured had there been any. Had plaintiff elected to introduce such facts, if they existed, then for the first time an obligation would have fallen on defendant to explain such facts, and, in default of explanation, a verdict then would have been warranted by evidence.

V.

Instead of plaintiff being wronged, the facts show the judgment appealed from grossly wrongs defendant.

Exhibit P-44 (A. A. 309) shows that in the period 1918-1930, inclusive, the total profits made from manufacturing under the contract in suit were $152,318.00, of which Stentor received $70,718.08.

On the execution of the contract Klaxon paid Stentor $130,000, whereupon Klaxon took over Stentor's physical

assets and accounts receivable appraised as worth $89,860 (Appellant, A. 302). In other words

Stentor received	
Down payment (Opinion, p. 4)	$130,000.00
Royalties (A. 309)	70,718.08
Total	$200,718.08
Klaxon received	
Share of earnings (Ex., p. 44)	$83,776.15
Physical assets and a/c's receivable	89,860.00
Total	$173,636.15

Is it to be supposed that Klaxon would not use its best endeavors to make more money if the patents were in fact valuable and the devices commercially useful?

In the face of this situation, did defendant do a wrong —as the Court states in its opinion?

Rather, defendant must now pay plaintiff $160,000, plus interest, which will more than strip defendant of everything it received on this contract from 1918 to date.

For the reasons above stated defendant respectfully prays for a re-hearing of the appeal in this cause and that the mandate may be stayed.

Dated, November 7th, 1940.

Respectfully submitted,

JAMES D. CARPENTER, JR.,
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75 Montgomery Street,
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HENRY M. HOGAN,
ROBERT H. SPREEN,
KEVIN MCINERNEY,
Of the New York Bar,
Of Counsel.

Certificate.

I, JAMES D. CARPENTER, JR., do hereby certify that the foregoing petition for re-hearing is presented in good faith and not for delay.

JAMES D. CARPENTER, JR.,
Of Counsel with Defendant.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7398

STENTOR ELECTRIC MANUFACTURING COMPANY, INC., Plaintiff-Appellee,

vs.

KLAXON COMPANY, Defendant-Appellant

SUR PETITION FOR REHEARING

Coram: Maris, Clark, Jones and Goodrich, Circuit Judges

And now, to wit, November 15, 1940 after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, —— — ——.

Albert B. Maris, Circuit Judge.

Endorsements: Order Denying Petition for Rehearing. Received & Filed Nov. 15, 1940. Wm. P. Rowland, Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Sct:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendices to the briefs of Defendant-Appellant and Plaintiff-Appellee, as constituting the portions of the record before this Court at argument; and proceedings in this Court in the case of Stentor Electric Manufacturing Company, Inc., plaintiff-appellee, vs. Klaxon Company, defendant-appellant, No. 7398, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 13th day of January in the year of our Lord one thousand nine hundred and forty-one and of the Independence of the United States the one hundred and sixty-fifth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. —

KLAXON COMPANY, Petitioner,

vs.

STENTOR ELECTRIC MANUFACTURING COMPANY, INC.

STIPULATION OF COUNSEL REGARDING RECORD

It is Hereby Stipulated between counsel for the petitioner and counsel for the respondent that the transcript of the record for use in the Supreme Court of the United States on petitioner's application for a writ of certiorari shall consist of the following:

(1) Appellant's Appendix.
(2) Appellee's Appendix.
(3) Appendix to Reply Brief for Appellant.
(4) Appendix to Plaintiff's Rebuttal Brief.
(5) Opinion of the Circuit Court of Appeals.
(6) Judgment of the Circuit Court of Appeals.
(7) Petition for Rehearng.
(8) Order of the Circuit Court of Appeals refusing to grant a rehearing.

The original transcript of record from the District Court need not be printed except as it may be contained in the appendices.

Dated: January 17, 1941.

Jas. D. Carpenter, Counsel for Petitioner. Murray C. Bernays, Counsel for Respondent.

[Endorsed:] Supreme Court of the United States. October Term, 1940. No. —. Klaxon Company, Petitioner, vs. Stentor Electric Manufacturing Company, Inc. Stipulation of Counsel Regarding Record. James D. Carpenter, Jr., Counsel for Petitioner, 75 Montgomery Street, Jersey City, N. J.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 3, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, limited to the first question presented by the petition for the writ.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.